(3)

Supreme Court, U.S.
FILED
OCT - 3 1993
OFFICE OF THE CLERK

No. 93-334

In The

Supreme Court of the United States

October Term, 1993

NICK GARCIA,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, SOUTHWEST AIR LEASING, JACKIE HOLMES, MIKE WARREN, GENE'S FLIGHT CLUB OF EL PASO and WARREN LUTTRELL,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth District of Texas

BRIEF IN OPPOSITION FOR RESPONDENTS SOUTHWEST AIR LEASING, JACKIE HOLMES AND WARREN LUTTRELL

EDWARD H. GREEN
WELLER & GREEN, L.L.P.
Attorneys for Respondents Southwest Air Leasing, Jackie Holmes and Warren Luttrell
P.O. Box 350
Beaumont, Texas 77704-0350
(409) 838-0101

BEST AVAILABLE COPY

4285
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

15 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the submission of an "unavoidable accident" instruction to the jury by the Texas state trial court constituted reversible error as a matter of law when the case involves both common-law and FELA defendants, thus requiring a new trial on Petitioner's claim for injuries arising out of the landing of an airplane which Respondents were using for "dead heading" crew members from New Mexico to Texas.

2. Whether as a matter of federal FELA law the Respondent railroad or the other Respondents involved in the air transportation of Petitioner and fellow railroad crew members were negligent per se in conducting an unauthorized commercial aircraft operation in violation of Part 135 of the Federal Aviation Regulations, and that such violation was a proximate cause and/or cause in whole or in part of the occurrence in question.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	3
I. Review should be denied because the submission of an "unavoidable accident" instruction to the jury by the Texas state trial court was proper in this case since there was sufficient evidence to support the instruction and this case involved both common-law and FELA defendants.	3
II. Review should be denied because an unauthorized commercial aircraft operation in violation of Part 135 of the Federal Aviation Regulations is not negligent per se in that said violation was not a proximate cause and/or a cause in whole or in part of the occurrence in question.	6
A. Federal Aviation Regulation § 135 Is Not Designed To Prevent Injury, But Is Merely A Commercial Licensing Requirement.	6
B. The Alleged Violation of F.A.R. § 135 Did Not Proximately Cause The Complained Of Accident.	8
Conclusion	9

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Baytown Construction Company v. City of Port Arthur, 792 S.W. 2d 554 (Tex. App. - Beaumont 1990, no writ) 3

Brown v. Edwards Transfer Co., Inc., 764 S.W. 2d 220 (Tex. 1988) 9

Carter v. William Sommerville & Son, Inc., 584 S.W. 2d 274 (Tex. 1979) 7, 8

Continental Oil Co. v. Simpson, 604 S.W. 2d 530 (Tex. Civ. App. - Amarillo 1980, writ ref'd n.r.e.) 7

Dallas Railway & Terminal Co. v. Bailey, 151 Tex. 359, 250 S.W. 2d 379 (1952) 3

Eckert v. Smith, 589 S.W. 2d 533 (Tex. Civ. App. - Amarillo 1979) 5

El Chico Corp. v. Poole, 732 S.W. 2d 306 (Tex. 1987) ... 6

Garza v. Alviar, 395 S.W. 2d 821 (Tex. 1965) 3

Gatenby v. Altsona Aviation Corp., 407 F.2d 443 (3rd Cir. 1968) 8

George Pharis Chevrolet, Inc. v. Polk, 661 S.W. 2d 314 (Tex. App. - Houston [1st Dist.] 1983, no writ) 5

Contents

Page

Gibson v. Northeast National Bank, 602 S.W. 2d 337 (Tex. Civ. App. - Fort Worth 1980, writ ref'd n.r.e.) 5

Hill v. Winn Dixie Texas, Inc., 849 S.W. 2d 802 (Tex. 1992) 3

In Re: Air Crash at Dallas/Forth Worth Airport, 919 F.2d 1079 (5th Cir. 1991) 8

Mills v. Mitsubishi Shipping Co., 358 F.2d 609 (5th Cir. 1966) 5

Nixon v. Mr. Property Management Corp., 690 S.W. 2d 546 (Tex. 1985) 9

Page v. St. Louis Southwestern Railway Co., 349 F.2d 820 (5th Cir. 1965) 5

Precision Motors v. Cornish, 413 S.W. 2d 752 (Tex. Civ. App. - Dallas 1967, writ ref'd n.r.e.) 5

Smith v. Illinois Central Railroad Co., 486 F.2d 943 (5th Cir. 1973) 5, 6

Transco Leasing Corp. v. United States, 896 F.2d 1435 (5th Cir. 1990), *rehearing denied in part and granted in part on other ground*, 905 F.2d 61 (5th Cir. 1990) 8

Yarborough v. Berner, 467 S. W. 2d 188 (Tex. 1971) 3

Contents

Page

Other Authorities Cited:

Federal Aviation Regulations:

§ 91.1 8

§ 91.67 8

§ 135 ..... i, 6, 8, 9

STATEMENT OF THE CASE

This is a suit by the Petitioner, Nick Garcia, seeking to recover actual and punitive damages arising out of an airplane incident that occurred at the El Paso International Airport on August 2, 1988. At the time, the Petitioner was a member of Southern Pacific Transportation Company's train crew which was being flown from Tucumcari, New Mexico to El Paso, Texas. The aircraft being used at the time was owned by Respondent, Jackie Holmes, and operated by Respondent, Warren Luttrell.

At the time of the incident Luttrell was returning from a round trip air flight from El Paso to Tucumcari. Luttrell, who was self-employed, had been approached by Respondent, Gene's Flight Club, about picking up Southern Pacific employees who had been working in New Mexico and returning them to El Paso. The Gene's Flight Club employee who normally flew this route was unavailable on this date, therefore Luttrell agreed to fly this round trip flight on this occasion.

Luttrell had no difficulties with the weather or anything else on the initial flight from El Paso to Tucumcari, where he picked up the South Pacific employees. Prior to and during the return flight to El Paso, Luttrell checked the El Paso weather forecast and was advised that there were no problems. Luttrell was subsequently made aware of the fact that a thunderstorm was in progress over the El Paso International Airport. As the plane was approximately 40 miles northeast of the airport, Luttrell was told by the El Paso Airport personnel that the airport was switching to Instrument Flight Rules. Pursuant to this relayed information, Luttrell confirmed that his airplane was equipped with IFR equipment and requested a runway approach. Throughout this period of time, Luttrell kept in constant communication with the El Paso International Airport personnel. When Luttrell was approximately eight to ten miles from the runway, he was turned over to the tower

at the El Paso International Airport and about that time he was close enough to visually see the beginning of the runway. So although the above-mentioned thunderstorm was visible, it was just as evident to Luttrell that the thunderstorm had clearly moved out of the vicinity of his approach to the El Paso International Airport. Luttrell was issued wind shear advisory information by the airport tower and was also given clearance to land his airplane.

As Luttrell approached the El Paso International Airport, the airport tower continued to allow him to land the airplane. Luttrell saw other airplanes landing and taking off from the El Paso International Airport as he was coming down to the runway. As he approached the end of the runway, a mild wind shift occurred, which is not an unusual situation. With the airplane approximately ten feet above the runway, Luttrell encountered an unexpected weather condition which caused the airplane to suddenly drop. The airplane came down on its nose at the side of the runway.

Subsequent to the incident at the El Paso International Airport, Petitioner received medical care for injuries he allegedly sustained in the incident. Petitioner was seen in the emergency room immediately following the incident and did not seek further medical treatment until approximately two weeks later. During this lapse of time, Petitioner flew to New Jersey. Since the airplane incident, Petitioner has been working out lifting weights on a regular basis. In fact, Petitioner's medical records reflect that the Petitioner had "large upper extremities secondary to his workout activity." As a result of this incident, Petitioner brought suit against the several Respondents based on common-law negligence, negligence under the FELA and violations of Federal Aviation Regulations.

REASONS FOR DENYING THE WRIT

I.

REVIEW SHOULD BE DENIED BECAUSE THE SUBMISSION OF AN "UNAVOIDABLE ACCIDENT" INSTRUCTION TO THE JURY BY THE TEXAS STATE TRIAL COURT WAS PROPER IN THIS CASE SINCE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE INSTRUCTION AND THIS CASE INVOLVED BOTH COMMON-LAW AND FELA DEFENDANTS.

While Petitioner may have had a FELA case against Southern Pacific Transportation Company, his lawsuit against Respondents, Warren Luttrell, Jackie Holmes and Southwest Air Leasing was based on common-law. As such, Respondents were entitled to an unavoidable accident instruction if raised by the evidence. The question to be determined by the trial court was whether there was *some* evidence presented at trial supporting a reasonable inference of unavoidable accident. *Baytown Construction Company v. City of Port Arthur,* 792 S.W. 2d 554, 562 (Tex. App. - Beaumont 1990, no writ); *citing Garza v. Alviar,* 395 S.W. 2d 821 (Tex. 1965). An unavoidable accident is present when an event occurs which was not proximately caused by the negligence of any party to the event. *Yarborough v. Berner,* 467 S.W. 2d 188 (Tex. 1971); *Dallas Railway & Terminal Co. v. Bailey,* 151 Tex. 359, 250 S.W. 2d 379 (1952). Physical conditions or circumstances ("nonhuman" ones) can result in unavoidable accidents. *Yarborough* at 191. An instruction on unavoidable accident is ordinarily given in cases involving "environmental conditions such as fog, snow, sleet, wet or slick pavement, or obstruction of view." *Hill v. Winn Dixie Texas, Inc.,* 849 S.W. 2d 802 (Tex. 1992). Such as instruction was proper in the instant case which involves non-human, environmental conditions or weather factors, *i.e.,* a thunderstorm, with accompanying wind currents.

During the testimony of Warren Luttrell, there was dispute as to whether a wind shear or wind shift caused the incident. Luttrell described the unforeseeable weather phenomenon that he encountered as he approached the runway at El Paso International Airport as "some sort of wind shift." Luttrell further confirmed the fact that there was *not* a thunderstorm directly over the El Paso International Airport and the sudden weather phenomenon Luttrell encountered while over the runway was unforeseeable. During the flight to El Paso, Luttrell contacted the flight service station in Roswell, New Mexico (which is about halfway between Tucumcari, New Mexico and El Paso, Texas) and was assured that the weather was fine. When he was about 25 to 28 miles away from the El Paso International Airport, Luttrell contacted the approach control and was informed that there were no problems with the weather. As he approached the runway, Luttrell testified that he could see that the thunderstorm had already passed over the area of his approach to the El Paso International Airport and that he was not flying into the thunderstorm. Luttrell was given clearance to land his airplane as he approached the runway. Luttrell testified that at the same time he was coming down onto the runway there were other planes taking off and landing. As set out above, Luttrell testified that he encountered an "unexpected" weather condition which caused his plane to drop, and this occurred while the plane was only 10 to 12 feet above the runway.

The above-mentioned testimony definitely points to the conclusion that the evidence presented at trial, when viewed in the light most favorable to the jury's finding, supports the instruction to the jury on "unavoidable accident." There existed at the trial at least *some* evidence of unavoidable accident. Any inferences to the contrary are not permissible under accepted standards of appellate review.

Further, Petitioner argues that an instruction on unavoidable accident was improper in a FELA case. This particular complaint

regarding this instruction was made for the first time, on appeal and therefore the error was waived. *George Pharis Chevrolet, Inc. v. Polk*, 661 S.W. 2d 314, 317 (Tex. App. - Houston [1st Dist.] 1983, no writ).

Further, even though Petitioner objected to the "unavoidable accident" charge on other grounds, a separate and distinct objection on the grounds offered on appeal was not made at the trial level and therefore such objection was waived. The grounds for new trial on appeal must be the same ones made in objection to the charge. *See Gibson v. Northeast National Bank*, 602 S.W. 2d 337, 340 (Tex. Civ. App. - Fort Worth 1980, writ ref'd n.r.e.); *Eckert v. Smith*, 589 S.W. 2d 533 (Tex. Civ. App. - Amarillo 1979, writ ref'd n.r.e.); and *Precision Motors v. Cornish*, 413 S.W. 2d 752 (Tex. Civ. App. - Dallas 1967, writ ref'd n.r.e.). Petitioner has waived his objection.

Petitioner cites *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965), and *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966) as supporting his contention that the unavoidable accident instruction should not have been given in this case. However, neither the *Page* case nor *Mills* case involved any common defendants. Because neither case involved any such defendant, they are not applicable to the case at bar where such common-law defendants exist.

In *Smith v. Illinois Central Railroad Co.*, 486 F.2d 943 (5th Cir. 1973), the court reviewed a cause of action which involved *both FELA* and *common-law defendants*. In *Smith*, the plaintiff, both in his complaint and at trial attributed the accident in question to a number of causes involving several defendants. The *Smith* court held that the trial court's instruction on unavoidable accident was indeed proper. The court reasoned that, "There was no substantial proof that any of these possible causes had in fact caused the accident, and the Plaintiff in making his case constantly

shifted ground in trying to fix liability for his injury on one or the other of the Defendants." Thus, the court continued, it was "as plausible to find the accident a result of unavoidable causes as it was to find the accident the result of any of the alternative causes cited by the Plaintiff." Therefore, an instruction on unavoidable accident was proper. *Smith* at 946.

II.

REVIEW SHOULD BE DENIED BECAUSE AN UNAUTHORIZED COMMERCIAL AIRCRAFT OPERATION IN VIOLATION OF PART 135 OF THE FEDERAL AVIATION REGULATIONS IS NOT NEGLIGENT PER SE IN THAT SAID VIOLATION WAS NOT A PROXIMATE CAUSE AND/OR A CAUSE IN WHOLE OR IN PART OF THE OCCURRENCE IN QUESTION.

A. Federal Aviation Regulation § 135 Is Not Designed To Prevent Injury, But Is Merely A Commercial Licensing Requirement.

Violations of statutes or regulations are considered as negligence per se only if the statutes or regulations are "designed to prevent an injury to that class of persons to which the injured party belongs." *El Chico Corp. v. Poole,* 732 S.W. 2d 306, 312 (Tex. 1987). Petitioner assumes that F.A.R. § 135 is designed to prevent or minimize injuries. However, he has pointed to no concrete case authority, legislative history or anything else of this sort to show that this is indeed the case. Petitioner states that a few cases decided by the Fifth Circuit mentioned that the F.A.R.'s "have the force and effect of law," but this blanket reference begs the material question in this matter, which is:

> Is the particular F.A.R. section in question (135) designed to protect a person such as Nick Garcia from the injury complained of?

No Texas court has ruled on whether the violation of Federal Aviation Regulations established negligence per se. However, at least one Texas court has dealt with this negligence per se issue as it deals with administrative regulations in general. In *Continental Oil Co. v. Simpson,* 604 S.W. 2d 530 (Tex. Civ. App. - Amarillo 1980, writ ref'd n.r.e.), the Amarillo Court of Appeals addressed the matter as follows:

> The availability of the negligence per se rule does not mean that it is applied obdurately to the violation of every administrative rule or regulation. Neither does the mere fact that an administrative agency promulgates a rule or regulation mean that the courts must accept it as a standard for civil liability.

Continental at 534.

Further, the Texas Supreme Court in *Carter v. William Sommerville & Son, Inc.,* 584 S.W. 2d 274 (Tex. 1979) stated:

> Negligence per se is a tort concept whereby a legislatively imposed *standard of conduct* is adopted by the civil courts as defining the conduct of a reasonably prudent person. (emphasis added)

Carter at 278.

As the Texas Supreme Court pointed out, the doctrine of negligence per se is applied only when the statute or regulation *defines a conduct* of individuals or entities in certain situations. In fact, when the *Carter* court later went on to list examples of statutes or regulations the violations of which would constitute negligence per se, *all the statutes and regulations listed by the court mentioned specifically defined conduct. Carter* at 278.

F.A.R. § 135 does not define any type of conduct upon which to analyze negligence per se issues. The relevant part of the Federal Aviation Regulations which would define conduct would be "Subpart D — VFR/IFR Operating Limitations and Weather Requirements." These Visual Flight Regulations govern the pilot's duties while operating aircraft under various conditions and flight rules. As such, these standards of conduct defined in this subpart are the pertinent regulations that are "designed to protect the safety of passengers on such commercial flights." In fact, the court in *Transco Leasing Corp. v. United States,* 896 F.2d 1435 (5th Cir. 1990), *rehearing denied in part and granted in part on other grounds,* 905 F.2d 61 (5th Cir. 1990), analyzed that particular negligence per se issue by looking not to general licensing requirements, but rather to F.A.R. § 91.67, which is one of the Visual Flight Regulations of § 91.1, *et seq. Transco* at 1446. Further, the court in another case, *Gatenby v. Altsona Aviation Corp.,* 407 F.2d 443 (3rd Cir. 1968), also analyzed its negligence per se issue by looking to whether the pilot abided by *Visual Flight Regulations.* The fact remains that Mr. Luttrell has never been found to have been in violation of any subsections of the *Visual Flight Regulations* of the Federal Aviation Regulations.

B. The Alleged Violation of F.A.R. § 135 Did Not Proximately Cause The Complained Of Accident.

Even if Respondent was found to be "negligent per se" through violation of a statute or regulation designed to prevent an injury to a class of persons of which the Petitioner was a member, the negligence inquiry does not stop at that point. In order for liability to attach, the Petitioner must have also shown that the Respondent's negligence *proximately caused* the injury. *Carter* at 278. "Proximate cause in Texas law consists of two elements: (1) cause in fact ('but for' causation) and (2) forseeability." *See In Re: Air Crash at Dallas/Fort Worth Airport,* 919 F.2d 1079, 1085 (5th Cir. 1991). "Cause in fact means that the negligent act at issue was a substantial factor in producing the injury, and without such

negligence no harm would have resulted." *See Brown v. Edwards Transfer Co. Inc.*, 764 S.W. 2d 220, 223 (Tex. 1988), citing *Nixon v. Mr. Property Management Corp.*, 690 S.W. 2d 546, 549 (Tex. 1985). F.A.R. § 135 played no part in Mr. Luttrell's thought processes and professional judgment calls as he was approaching the El Paso International Airport. Luttrell's encounter with the unexpected wind shift as he was approaching the runway on the day in question would have occurred regardless of whether or not Luttrell complied with F.A.R. § 135. Thus, no "but for" causation exists that would support Petitioner's negligence per se claim.

CONCLUSION

Petitioner, Nick Garcia, received a proper and fair submission of each of his claims against all Respondents in the trial of this cause of action from which this appeal was taken. Based upon all of the foregoing authorities, Nick Garcia's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD H. GREEN
Counsel of Record
WELLER & GREEN, L.L.P.
Attorneys for Respondents Southwest Air Leasing, Jackie Holmes and Warren Luttrell
P.O. Box 350
Beaumont, Texas 77704-0350
(409) 838-0101